

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Matter of the Personal)	
Restraint of)	No. 76730-1
)	
RICHARD J. DYER,)	En Banc
)	
Petitioner.)	Filed July 27, 2006
_____)	

C. JOHNSON, J.—This case requires the court to determine whether the Indeterminate Sentence Review Board (ISRB) abused its discretion when it determined that Richard J. Dyer was not parolable. The ISRB has broad discretion in making parolability decisions, but this discretion does not enable the ISRB to disregard the evidence presented at the hearing and base a decision on speculation and conjecture unsupported by evidence in the record. We hold the ISRB abused its discretion in determining that Dyer was not parolable and therefore do not reach Dyer’s claims that the ISRB violated his constitutional rights. We reverse the decision of the ISRB and remand to the ISRB.

FACTS

Dyer was convicted by a jury of first degree rape of two individuals. Resp. of ISRB, Ex. (hereinafter ISRB Ex.) 2, at 1. On February 19, 1982, the sentencing court imposed a maximum term of life imprisonment for each count, with the sentences running concurrently.¹ Under the indeterminate sentence system, the ISRB makes the decision regarding the duration of confinement. In making this decision, the ISRB must “consider the purposes, standards, and sentencing ranges adopted pursuant to RCW 9.94A.850 [the Sentencing Reform Act of 1981 (SRA)] and the minimum term recommendations of the sentencing judge and prosecuting attorney” RCW 9.95.009(2).

The SRA directs that “[w]hen making decisions on duration of confinement, . . . the board shall . . . attempt to make decisions reasonably consistent with [the SRA] ranges, standards, purposes, and recommendations.” RCW 9.95.009(2).

With the exception of sentence enhancements, the SRA ranges do not increase or decrease based on the nature of a particular offense. In establishing standard range

¹ Because Dyer committed the acts underlying his convictions before July 1, 1984, the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, did not apply to his sentence and he remains under Washington’s former indeterminate sentencing system. *See* RCW 9.94A.905.

sentences, the SRA takes into account the uniform seriousness level of the current offense and the defendant's offender score. RCW 9.94A.530(1). Consistent with SRA guidelines and directives, the ISRB imposed an exceptional minimum term of 240 months on September 15, 1986, departing from the SRA guidelines of 66-88 months because "the commission of the offense manifested deliberate cruelty"² ISRB Ex. 4, at 1.

The ISRB considered Dyer for parole under RCW 9.95.100 in 1995, 1998, and 2002. On each occasion, the ISRB denied parole and extended Dyer's minimum term by 60 months. The record shows that during his prison term, Dyer has participated in the following offender change programs: anger/stress management, victim awareness, nonviolent conflict resolution, moral recantation therapy, and industrial safety. Opening Br. of Pet'r, App. (hereinafter Pet'r App.) F at 1. However, Dyer has not been permitted to enter the sex offender therapy program because he denies committing the rapes for which he was convicted.

² The dissent focuses heavily on the nature of the offenses. We recognize the details of the crimes may be relevant to the ISRB's establishment of the offender's minimum term and parolability under the indeterminate sentencing system. But the dissent's emphasis on the facts of Dyer's crimes disregards the legislature's mandate that an offender's confinement under the indeterminate system and the SRA remain reasonably consistent.

The challenge in this case concerns the ISRB's hearing in 2001 and decision on January 30, 2002. In preparation for the ISRB's 2001 hearing to evaluate Dyer's parolability, Carson E. Carter, a Washington State Department of Corrections (DOC) licensed mental health counselor, conducted a psychological evaluation of Dyer at the ISRB's request. Carter has substantial experience administering tests relating to risk, and evaluating and counseling persons committed as sexually violent predators. Pet'r App. I at 1. Carter evaluated Dyer's criminal behavior, social history, current behavior and functioning, and sexual behavior, and conducted a clinical interview and administered several psychological tests.³ In his evaluation, Carter reported that "[h]is scores are typical of sex offenders who present a low risk to reoffend," and concluded, "[i]f we are gauging risk, he has met the criterion for a less restrictive environment." Pet'r App. E at 3-4.

During the hearing on December 4, 2001, Dyer's parolability was again evaluated. Pet'r App. H. Carter was not present, but John Austin, the chair of the

³ The dissent disregards that this professional evaluator considered Dyer's complete file and record of crimes.

ISRB, repeatedly assured Dyer and his attorney that the ISRB accepted Carter's credentials, and the evaluation was admitted as evidence. Pet'r App. H at 2, 3, 10. Dyer's counselor, Larry Cook, testified that Dyer worked as a recreational assistant and received exemplary work reports from all the recreation supervisors. He noted that "everything about his attitude and behavior in the unit has been exemplary" and confirmed Dyer's family support. Cook reported that Dyer "completed all the available offender change programs that are available here at McNeil Island" and that to his knowledge, Dyer had never refused any counseling offered to him. Pet'r App. H at 5-7.

In addition to Dyer's testimony and his attorney's arguments, the members of the ISRB discussed their perceptions of Dyer's situation. Austin stated he would not hold Dyer's denial of guilt against him,

I'm not going to hold somebody just because they deny it, because every [sic] I read about sexual offenders is denial is not what's called a risk factor, it's not used in these various instruments that your counselor has mentioned. Denial per se is not itself a risk factor so I don't use it to hold it against somebody . . . I don't hold his denial against him, and I don't consider him manipulative. I accept your sincerity, Mr. Dyer.

Pet'r App. H at 14, 22. Instead, Austin was concerned with Dyer's good behavior

in prison, which he viewed as consistent with “the calculating nature of the behavior” during the rapes. Pet’r App. H at 15. He said, “I expect you to exhibit that controlled behavior, because that’s what’s shown in the rapes,” but also acknowledged, “[i]t’s a catch-22 irony. Because a person who is innocent and has been dealt a bad hand is going to try to figure a way to play the best he can, and it’s quite obvious that you made an accommodation for prison life.” Pet’r App. H at 15-16. The ISRB issued its report and decision denying parole to Dyer on January 30, 2002. The ISRB stated, “[a] central difficulty for the Board is that Mr. Dyer remains an untreated sex offender.” ISRB Ex. 11, at 3. The ISRB continued, “[m]ore serious and significant to the Board is that these particular types of rape appear to be in reaction to stress.” ISRB Ex 11, at 3. He “shows that he is an orderly person, careful in his work and is able to maintain himself within the institution . . . , precisely the behavior demonstrated in the crimes.” ISRB Ex. 11, at 3. The ISRB concluded, “[t]hus Mr. Dyer, for the Board, is an untreated sex offender with behaviors that are apparently motivated when he is in a period of stress.” ISRB Ex. 11, at 3. The ISRB conceded Dyer’s risk of reoffense

“[a]ppears to have been ameliorated in current psychological tests,” but stated “[o]f concern to the Board is the ability to learn how to take psychological tests.” ISRB Ex. 11, at 4.

The ISRB concluded that Dyer was not parolable and extended his minimum term by 60 months. In reaching this conclusion, the ISRB stated that it considered the materials in Dyer’s file, including previous ISRB decisions, file materials of the Department of Corrections, and earlier psychological evaluations, which provided the basis for denying parole in Dyer’s prior hearings.

ANALYSIS

The decision of whether to parole a prisoner “may be made for a variety of reasons and often involves no more than informed predictions as to what would best serve correctional purposes or the safety and welfare of the inmate. The decision turns on a ‘discretionary assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he has done.’” *Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 10, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979) (quoting Sanford H. Kadish, *The Advocate*

and the Expert – Counsel in the Peno-Correctional Process, 45 Minn. L. Rev. 803, 813 (1961)). We review parole eligibility decisions to ensure the ISRB exercises its discretion in accordance with the applicable statutes and rules. The ISRB abuses its discretion when it fails to follow its own procedural rules for parolability hearings or acts without consideration of and in disregard of the facts. *In re Pers. Restraint of Addleman*, 151 Wn.2d 769, 776-77, 92 P.3d 221 (2004).

The legislature requires the ISRB to “attempt to make decisions reasonably consistent with [the SRA] ranges, standards, purposes, and recommendations [of the sentencing judge and prosecuting attorney]” and “give public safety considerations the highest priority when making all discretionary decisions on the remaining indeterminate population regarding the ability for parole, parole release, and conditions of parole.” RCW 9.95.009(2), (3). In making its decision on an inmate’s parolability, the ISRB is guided by WAC 381-60-160, which provides:

The board panel shall render a decision of either parolable or not parolable on each case heard under this chapter . . .

Examples of adequate reasons for a finding of nonparolability include, but are not limited to:

1. Active refusal to participate in available program or resources designed

to assist an offender to reduce the risk of offense (e.g., anger management, substance abuse treatment).

2. Serious and repetitive disciplinary infractions during incarceration.
3. Evidence of an inmate's continuing intent or propensity to engage in illegal activity (e.g., victim harassment, criminal conduct while incarcerated, continued use of illegal substances).
4. Statements or declarations by the inmate that he or she intends to re-offend or does not intend to comply with conditions of parole.
5. Evidence that an inmate presents a substantial danger to the community if released.

Although this list of reasons that may support an ISRB finding of nonparolability is not exhaustive, the list should guide the ISRB's decisions. In the present case, the record from the hearing does not support any of these factors.⁴ Dyer does not actively refuse to participate in available programs or resources designed to assist him reduce his risk of reoffense. Rather, Dyer participated in several offender change programs. He does not actively refuse to participate in the sex offender treatment programs; rather he is rendered ineligible for treatment in that

⁴ While the reasons listed in the WAC that support a finding of nonparolability do not, by their absence, mandate parole, some objective evidence presented at the hearing must support a finding of nonparolability.

program because he denies his guilt. The record does not reflect that Dyer has serious and repetitive disciplinary infractions but instead shows that he maintains good behavior in prison. He does not engage in criminal conduct in prison and states that he will maintain lawful behavior if released. Previous psychological evaluations indicating he posed a risk of reoffending do not constitute evidence that he currently presents a substantial danger to the community if released. His current psychological report shows that he poses little danger to the community if paroled.

The inmate bears the burden of establishing his parolability. In turn, the ISRB must base its decision on the evidence presented at the hearing. In this case, in reaching its conclusion that Dyer is not parolable, the ISRB disregarded the evidence presented, including his most recent psychological evaluation. The ISRB stated that it relied on objective evidence, including “previous Board dictations, file materials of the Department of Corrections and the ISRB, the interview with Dyer, and arguments of his counsel.” ISRB Ex. 11, at 4. Though the ISRB states that it considered this material, the ISRB’s decision gives no indication that the evidence in the file supported its decision or that the evidence was used to refute any new

evidence presented at the hearing. Instead, the ISRB's decision is primarily supported by speculation and conjecture suggesting that Dyer is manipulative, poses a high risk to reoffend, and had the ability to learn how to take psychological tests. The ISRB also relied on the unchangeable circumstances of Dyer's crimes, the same facts that justified the imposition of Dyer's original exceptional sentence.

Though the regulations do not explicitly require the ISRB to consider psychological evaluations, the ISRB consistently obtains the reports and relies on them for its decisions on prisoners' parolability. For example, the ISRB has relied on psychological screening and tests in other cases to find a prisoner not parolable because he "presents too great a risk to be released to the community at this time." *In re Addleman*, 151 Wn.2d at 778 ("Those tests and the psychologist suggest that Addleman presents a high risk of committing another violent offense within six months after release.").

When the ISRB disregards current psychological reports and evaluations and gives significant weight only to previous evaluations that support a finding that an inmate is not parolable without making findings to support that approach, the ISRB

fails to follow the procedures outlined by the WAC regulations. Here, the ISRB relied substantially on evaluations in each of its prior parole decisions regarding Dyer. In its 2002 decision at issue in this case, the ISRB stated that “psychological data in the file from the early 1990s indicated a relatively high reoffense risk,” but acknowledged that “[t]his risk appears to have been ameliorated in current psychological tests.” ISRB Ex. 11, at 4. The ISRB nonetheless concluded Dyer is an untreated sex offender and denied him parole. ISRB Ex. 11, at 1.

The evidence presented to the ISRB supports the argument that Dyer currently poses a low risk of reoffending. Dyer’s December 2001 psychological evaluation contradicts the ISRB’s conclusion that Dyer is not rehabilitated and poses a high risk to reoffend. In his evaluation, Carter reported that “the instruments that typically predict recidivism indicate [Dyer] is a low risk to reoffend”⁵ Pet’r App. E at 4. He found that Dyer “is prepared to take his place in society as a productive citizen” because he has “a legitimate home address, realistic plans for the future, and employable skills.” ISRB Ex. E at 4. Carter concluded

⁵ This evaluation took into account that Dyer did not admit guilt or participate in a sex offender treatment program. Pet’r App. E at 4.

that Dyer “could be considered for community supervision with less concern for the community than many of the offenders who are released into society.” Pet’r App. E at 4.

With respect to Dyer’s earlier evaluation of PTSD, Carter reported, “Mr. Dyer suffers from no serious mental illness, but he does suffer the lingering effects of PTSD, much like many war veterans.” Pet’r App. E at 2. The ISRB questioned Dyer about his PTSD diagnosis during his parolability hearing, and Dyer responded openly about his enduring nightmares of his service in Vietnam, where 9 of his 12 unit members were killed. He acknowledged that he may have anxiety attacks and that “something will trigger it, like the helicopters going over,” but explained, “I’ve learned that I’ve got it.” Pet’r App. G at 19. Dyer reported that after he was diagnosed with PTSD, he participated in programs relating to victim awareness, alternatives to violence, and moral recantation therapy and worked as a facilitator for stress anger management “for most of [the programs].” Pet’r App. G at 11. He stated he had contacted several programs, “clinics in house and out of house” in Seattle, Spokane, and Oklahoma (where his family resides) and prepared paperwork

to enter the programs in case he was paroled. He also indicated he started a group at the reformatory for combat veterans suffering from PTSD. Pet'r App. G at 19.

Despite the evidence that Dyer has a low risk of reoffending and an ability to adequately readjust to life outside prison, the ISRB's decision evidently ignored Dyer's evidence and rejected the value of Carter's evaluation because of the ISRB's concern with Dyer's "ability to learn how to take psychological tests." ISRB Ex. 11, at 4. Nothing in the record supports a conclusion that Dyer has learned how to manipulate tests.⁶ Since the record provides no support for this concern, the ISRB relied on the nature of Dyer's underlying criminal behavior, which it contended evidenced a "high level of manipulation and sophistication." ISRB Ex. 11, at 4. Evidently, the ISRB believed the manipulation and sophistication were illustrated by the facts which supported his convictions. ISRB Ex. 11, at 3. Objectively, nothing exists in the record to support this conclusion, other than conjecture. The nature of his crimes does not necessarily support the ISRB's conclusion that Dyer recently

⁶ Dyer participated in the majority of his offender change and treatment programs in 1996, 1997, 1997, and 1999. The 1993 and 1994 psychological evaluations rated his risk of reoffense as high, but the 1998 evaluation rated his risk as low to medium and the 2001 evaluation rated his risk of reoffense as low. ISRB Ex. 10, at 2-3; Pet'r App. E at 3.

learned how to take psychological evaluations. The record reflects the psychological tests are administered by Washington State Department of Corrections psychologists and licensed mental health counselors, based on objective factors, and specifically designed to prevent manipulation by the offender. Neither the record nor the nature of Dyer's crimes supports the ISRB's suggestion that Dyer could have manipulated Carter's psychological evaluation.

In addition to disregarding the favorable psychological evidence, the ISRB focused substantially on the unchangeable circumstances of Dyer's crimes, which occurred in 1980. Despite its statutory mandate to consider whether a prisoner demonstrates his rehabilitation is complete, the ISRB dismissed evidence of Dyer's rehabilitation in prison evidently based on the facts of his underlying crimes. The ISRB disregarded the fact that Dyer participated in offender change programming and assumed his good behavior in prison is motivated by manipulation, again with nothing in the record to support this conclusion. The ISRB also suggested that if Dyer were released, he "[w]ould encounter far more stresses than he may now, having accommodated to his life in the institution." ISRB Ex. 11, at 3-4. The ISRB

stated that “[i]t’s the potential reaction to that stress that is of significant concern to the Board as a trigger to more attacks.” ISRB Ex. 11, at 4. Again, this statement is unsupported by the evidence in the record and is undermined by Dyer’s participation in offender change programming and commitment to obtaining PTSD treatment outside of prison. The ISRB’s reliance on the nature of Dyer’s crimes and disregard of evidence of Dyer’s rehabilitation conflicts with its statutory responsibility to consider the evidence presented in determining whether a prisoner has established he is rehabilitated.

CONCLUSION

The ISRB ignored favorable evidence from psychological evaluations; though the ISRB is not required to consider them, the ISRB consistently relies on these evaluations in making parolability decisions. The ISRB based its decision on unsupported notions that Dyer manipulated the psychological evaluations and poses a high risk of reoffense because of his good behavior in prison and the nature of his crimes. The ISRB possesses broad discretion in determining parolability, but this discretion is not without limits. The ISRB cannot ignore the evidence presented at

the hearing nor rely on mere conjecture in making its decisions. Where the ISRB disregards the evidence presented and supports its decision with speculation and conjecture, it abuses its discretion.

In his personal restraint petition, Dyer requests that the court order the ISRB to find him parolable, or at least conditionally parolable to a mutual agreement program. In the alternative, Dyer asks the court to remand with instructions to hold a new parole hearing.

While a review of the evidence and testimony presented at the parolability hearing suggests Dyer met his burden to have conditions of release on parole established, we cannot make this decision in the first instance. We instead remand to the ISRB for a new parolability hearing during which the ISRB must make its determination based on the evidence and testimony presented, and not on speculation and conjecture.

AUTHOR:

Justice Charles W. Johnson

WE CONCUR:

Cause No. 76730-1

Chief Justice Gerry L. Alexander

Justice Tom Chambers

Justice Richard B. Sanders

Justice James M. Johnson
